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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981

No. 81 5937

DEWEY EUGENE COLEMAN,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the uncorroborated testimony of an alleged accomplice sufficient to support a capital conviction and death sentence under the Fifth, Eighth, and Fourteenth Amendments?

2. Did Montana's failure to provide participation by a jury in imposing the death penalty deny Coleman his right to the judgment of his peers in contravention of the Sixth, Eighth, and Fourteenth Amendments?

3. Did the sentencing judge deny Coleman due process of law in violation of the Fifth and Fourteenth Amendments by basing his conclusion that no significant mitigating circumstances existed on his conclusion that Coleman had committed a crime with which he was never charged, a conclusion that Coleman had no adequate opportunity to refute?

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DEWEY EUGENE COLEMAN,

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dewey Eugene Coleman respectfully prays that this Court issue a writ of certiorari to review the judgment of the Supreme Court of the State of Montana in this case.

OPINIONS BELOW

The Supreme Court of Montana affirmed the trial court's denial of petitioner's motion for post-conviction relief in an opinion reported at __ Mont. ____, 633 P.2d 624 (1981) and reproduced in the Appendix at 1. The opinion of the District Court of the Sixteenth Judicial District of Montana denying petitioner's motion for post-conviction relief is unreported and is reproduced in the Appendix at 93.

JURISDICTION

The judgment of the Supreme Court of Montana was rendered on August 28, 1981. A timely motion for rehearing was denied on September 28, 1981. As a motion for post-conviction relief in Montana is a civil action, this petition is timely as specified by 28 U.S.C. § 2101(c) and Supreme Court Rule 20.2.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and Sections 46-18-301 through 46-18-310 of the Montana Code Annotated, all of which are set forth in the Appendix at 198.

STATEMENT OF THE CASE

A. Procedural History.

Petitioner Dewey Eugene Coleman was convicted by a jury on November 14, 1975, of deliberate homicide, aggravated kidnapping, and sexual intercourse without consent. He was sentenced to prison terms of 100 years for deliberate homicide and 40 years for sexual intercourse without consent and was sentenced to death as required by the aggravated kidnapping statute then in effect. In his first appeal, State v. Coleman, 177 Mont. 1, 579 P.2d 732 (1978), Appendix at 168, the Montana

Supreme Court held, expressly relying on this Court's decisions in Woodson v. North Carolina, 428 U.S. 280, Coker v. Georgia, 433 U.S. 584, and Roberts v. Louisiana, 431 U.S. 633, that the mandatory death penalty provided by the aggravated kidnapping statute violated the United States Constitution. With one dissent, the court affirmed Coleman's conviction on all three counts and his prison sentence for deliberate homicide; it remanded the case to the district court for resentencing for aggravated kidnapping and sexual intercourse without consent.

On remand, after a sentencing proceeding under a Montana death penalty statute that was passed after Coleman's conviction, the district court sentenced Coleman to 20 years in prison for sexual intercourse without consent and again sentenced him to death for aggravated kidnapping. Coleman appealed and the Montana Supreme Court affirmed the sentences, State v. Coleman, ____ Mont. ____, 605 P.2d 1000 (1979), Appendix at 107. Rehearing was granted and, after oral argument, the sentences were again affirmed. State v. Coleman, ___ Mont. ___, 605 P.2d 1000, 1051 (1979), Appendix at 158. Justice Shea dissented from both opinions. Coleman petitioned this Court for certiorari, which was denied, Coleman v. Montana, 446 U.S. 970, as was his petition for rehearing, 448 U.S. 914.

Coleman also applied to the Montana Supreme Court for a special writ to review the proceedings of the Sentence Review Committee of that court, which had denied his petition for sentence review. The writ was denied on March 21, 1980 in an unpublished order. Coleman then sought a writ of certiorari from this Court to the Sentence Review Division, which was denied. Coleman v. Sentence Review Division of the Supreme Court of Montana, 449 U.S. 893.

The present action began when Coleman petitioned the District Court of Rosebud County, Montana for post-conviction relief under Mont. Code Ann. § 46-21-101. His petition was denied without an evidentiary hearing. The Montana Supreme Court affirmed denial of post-conviction relief on August 28, 1981, Coleman v. State, _____ Mont. _____, 633 P.2d 624 (1981), and remanded the case to allow setting an execution date. Justices Morrison and Shea dissented. The district court ordered that Coleman be hanged on November 27, 1981.

Coleman sought a stay of execution from the Montana Supreme Court, which denied his motion on October 23, 1981. He then applied to Justice Rehnquist, Circuit Justice for the Ninth Circuit, for a stay of execution pending determination of his petition for a writ of certiorari, which was denied. The application was renewed to Justice Marshall and referred by him to the conference, which denied it on November 16, 1981. A petition for writ of habeas corpus and an application for stay of execution pending determination of that petition was then filed in the United States District Court of Montana. The State of Montana stipulated to entry of a stay of execution, which was granted on November 19, 1981.

B. Statement of Facts.

This is an unusual and troubling capital case. Coleman has never confessed to the crime. In fact, the State rejected Coleman's offer to plead guilty in return for a non-capital sentence solely because Coleman refused to abandon his claim of innocence in his plea. The only evidence inconsistent with the story Coleman told at trial was the largely

uncorroborated testimony of Robert Dennis Nank, Coleman's alleged accomplice. Nank had a felony record and a history of violence, psychiatric treatment, and sexual deviance; Coleman had no history of violence and no record. Nank pleaded guilty, testified against Coleman, and was sentenced to imprisonment; Coleman maintained his innocence, testified at trial, and was sentenced to death. Nank is white; Coleman is black. In the words of Justice Morrison, dissenting in the latest Montana Supreme Court decision:

> In my nineteen years at the bench and bar I have seldom been so deeply disturbed by the injustice of a result. A defendant is here sentenced to die where there is practically no credible evidence connecting the defendant to the commission of the crime. There are strong reasons to believe that the defendant did not commit the crime for which the death penalty was imposed. And yet this Court is authorizing the imposition of that irrevocable sanction. I implore the federal courts to examine this record, and upon finding it to be as wanting as I do, to intervene and prevent this gross injustice.

633 P.2d at 641.

On July 4, 1974, Coleman and Nank were traveling toward Forsyth, Montana on U.S. Highway 12. On the same day, Peggy Lee Harstad, a 21-year old woman, disappeared while driving alone along that highway. Her car was found the next day off the highway near Rosebud, Montana. The ensuing investigation quickly focused on Coleman and Nank, who had been seen hitchhiking on that road at about the time Harstad disappeared.

Fingerprint identifications linked Nank to Harstad's car and Coleman to a paper found in Harstad's abandoned purse. Nank and Coleman were first interviewed and then kept under surveillance. At the end of August, Harstad's body was found on the banks of the Yellowstone River. Nank and Coleman were arrested on October 17, 1974 and charged with deliberate homicide. After a few hours in custody, Nank gave a full confession, implicating himself and Coleman.

On May 7, 1975, the State entered into a written plea bargain agreement with Nank. He agreed to plead guilty to deliberate homicide and solicitation to commit sexual intercourse without consent and to testify against Coleman at trial. In return the State agreed to move after Coleman's trial to dismiss the aggravated kidnapping charge, which carried a mandatory death sentence. Two weeks later, Coleman offered to plead guilty in return for dismissal of the aggravated kidnapping charge. The State refused to accept his conditional guilty plea because Coleman insisted on maintaining his innocence.

The trial was largely a conflict between the testimony of Nank and Coleman about the events of July 4. They agreed that their motorcycle ran out of gas on the highway and that they tried without immediate success to hitchhike to a gas station. At that point their stories diverged.

Coleman testified that, after their initial failures, Nank succeeded in getting a ride without Coleman. Coleman waited by the highway for Nank to return. When Nank returned several hours later, he was driving a car, wet, upset, and

acting strangely. After Coleman got in the car, Nank said that he had killed a girl. Nank drove the car until it ran out of gas. As they walked to town, Nank gave Coleman a purse to carry, which, on Nank's orders, Coleman later threw away. They walked to Forsyth, bought gasoline, retrieved their motorcycle, and continued on their way.

Nank's story was quite different. He testified that Harstad stopped and gave him and Coleman a ride. He stated that he, Nank, disrobed her and tried unsuccessfully to rape her. Coleman then raped her. They took Harstad to the Yellowstone River, where, according to Nank, he and Coleman drowned her, after Coleman beat her with his motorcycle helmet and tried to strangle her with a yellow rope. Nank testified that they then drove the car back toward Forsyth until it ran out of gas. At that point, their two stories converge.

The State's other evidence included testimony linking Nank and Coleman to the area of the crime and expert testimony about the fingerprints and hair specimens associated with the crime. The defense presented psychological evidence that Coleman, a homosexual, would have been very unlikely to have participated in this crime. The jury convicted Coleman on all three counts.

C. How the Federal Issues Were Raised and Decided Below.

This section will discuss how these three federal issues were raised below in the instant action. Coleman's petition for post-conviction relief raised 52 issues, labeled A through ZZ. Each issue raised in this petition for certiorari

was also raised in the course of the State's criminal action against Coleman.

Two of the 52 issues raised in the petition below argued that the evidence was insufficient as a matter of federal constitutional law to justify Coleman's conviction and sentence, issues A and O. The trial court ruled that these claims were barred by res judicata and that Coleman's citation of new authority did not circumvent that bar. The Montana Supreme Court agreed. 633 P.2d at 631.

In two issues below, labeled HH and PP, Coleman urged that the exclusion of the jury from all participation in the capital-sentencing decision violated the United States Constitution. He urged in issue HH that the jury's participation was required by the Eighth Amendment and in issue PP that the right to determination of aggravating and mitigating facts by the jury was guaranteed by the Sixth Amendment. The trial court found that these issues were barred by res judicata; the Montana Supreme Court agreed. 633 P.2d at 631.

Coleman urged below that the trial court's elimination of the mitigating circumstance that he had no prior criminal record by his reliance on Nank's testimony that Nank and Coleman burglarized a house the day of the murder violated his rights. The trial court ruled that this issue, labeled DD, was barred by res judicata. The Montana Supreme Court once more agreed. Id.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Coleman's story presents a compelling example of the possibilities for mistake and caprice contained in Montana's capital punishment scheme. The case against him, made through the mouth of one buying his life with his testimony, is so weak that the real possibility of error cannot be excluded. The unfairness of the disparate treatment meted out to Coleman and to Nank cries out against Montana's decision to rest responsibility for the capital punishment decision solely in the hands of a trial judge. This death sentence was unfairly imposed after Coleman's spotless prior record was disregarded as a result of trial testimony Coleman never had a meaningful chance to attack.

As Justice Shea said in dissent below "I cannot conceive that this case will leave a federal court with the abiding conviction that justice was done." 633 P.2d at 666. It is in this setting that Coleman's constitutional arguments must be considered.

A. The Evidence in This Case Is Not Sufficient to Support Coleman's Conviction and Death Sentence Under the Fifth, Eighth, and Fourteenth Amendments.

"The Constitution prohibits the conviction of any person except upon proof beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 309. The evidence adduced against Coleman at his trial was so slight -- and its source so suspect -- that its use to convict him violates the requirements of the Fifth and Fourteenth Amendments. Even if his conviction could stand, however, imposition of the death penalty in such a case

would be a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

A full statement of the facts of this case is contained in the first Coleman appeal, which upheld Coleman's conviction against his argument that the evidence against him was insufficient. That determination was wrong: the evidence against Coleman is not just legally insufficient but almost nonexistent.

This case turns on the similar but diverging stories told at trial by Coleman and Nank. Nank bargained for his life and part of the price he paid was his agreement to help convict Coleman.[1/]

In the first Coleman appeal, the Montana Supreme Court acknowledged that Montana law required corroboration of Nank's story by other evidence that tended to connect Coleman with the commission of the offense, but the court concluded that sufficient corroboration existed in this case.

> [W]e hold there was sufficient corroboration of Nank's testimony to sustain defendant's conviction. The corroborating evidence is: The crack in defendant's motorcycle helmet; a hair of Peggy Lee Harstad being on the rope belonging to these men; the finger-

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1/ In fact, the State did not move to dismiss the aggravated kidnapping charge against Nank until after he had finished testifying in Coleman's trial. Nank could have been under no illusions about the importance of that testimony to his future.

> prints on her car and in her purse; the Negroid pubic hairs similar to defendant's and the Negroid head hair found in her car; and, the evidence that defendant and Nank were seen together on the same road and at approximately the same time that Peggy Lee Harstad disappeared.

579 P.2d at 748.

In dissent in the instant case, Justice Morrison convincingly attacked this evidence of corroboration. He pointed out that most of the evidence the court cited as corroboration would support equally Nank's story and Coleman's. That Harstad's hair was found in the rope, the fingerprints associated with the car and the purse, Negroid head hair in the car, and the sightings of Nank and Coleman together on the road is "'equally consonant with the reasonable explanation pointing toward innocent conduct on the part of the defendant' as it is pointing toward guilt, and therefore, does not qualify as corroborating evidence." 633 P.2d at 635. He continued:

> If there is any corroborating evidence sufficient to take this case to the jury it must be found in the cracked motorcycle helmet or in reliable testimony that Coleman's pubic hairs were found in the victim's vehicle. A careful reading of the trial transcript shows that sufficient corroboration did not exist.

Id.

Nank testified that Coleman struck the victim on her head with his motorcycle helmet. Coleman's motorcycle helmet,

which was introduced in evidence, was cracked. The transcript of the trial shows no evidence, other than Nank's story, that Coleman's helmet had been cracked by striking a person's head or that such a blow could crack a motorcycle helmet, which is designed to withstand the impacts from serious accidents. In addition, the forensic pathologist who testified for the State at trial testified that there was no evidence the victim had suffered any head injuries.

The only other evidence tying Coleman to the crime consisted of two pubic hairs found in the victim's car. The State's expert witness testified that the pubic hairs taken from the car and those taken from Coleman were both from black males and could have come from the same source. He did not conclude that they had come from the same source, he did not indicate how many people could have been the source of those hairs, and he did not testify about the age of the hairs taken from the car.

The Constitution demands more evidence than this. Jackson v. Virginia, 443 U.S. 307, establishes the proper standard:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

443 U.S. at 319 (emphasis in original). Here, that question must be answered no. The only evidence inconsistent with

Coleman's story was Nank's testimony, given by a man testifying to save his own life. The evidence put forward by the Montana courts as corroborating Nank's story either was consistent with Coleman's story or was of almost no probative value. Based on those facts, no rational jury could decide beyond a reasonable doubt that Nank's story was true and Coleman's was false. Due process of law, guaranteed by the Fifth Amendment, as applied to Montana through the Fourteenth Amendment, forbids this Court to uphold Coleman's convictions.[2/]

Yet, even if this Court were to conclude that this evidence can support a verdict of guilty, the Constitution cannot allow a man to hang on the basis of evidence this weak.

The consistent thrust of this Court's decisions on capital punishment over the past decade has been to try to make it as certain as possible that the death penalty is not imposed arbitrarily, discriminatorily or mistakenly. The Fourteenth Amendment is offended by a death sentence that is imposed so arbitrarily as to be nearly random, Furman v. Georgia, 408 U.S. 238; by a death sentence imposed mandatorily,

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2/ Although there is authority that uncorroborated accomplice testimony is constitutionally sufficient under Jackson to support a conviction, Jacobs v. Redman, 616 F.2d 1251, cert. denied, 446 U.S. 944 (1980), and sufficient under federal criminal law to uphold a federal conviction, Caminetti v. United States, 242 U.S. 470, 495, the evidence in this case is so weak and the accomplice's motive in testifying so strong that this conviction cannot stand.

Woodson v. North Carolina, 428 U.S. 280, Roberts v. Louisiana, 428 U.S. 325; by a death sentence that is imposed without full consideration of mitigating circumstances, Lockett v. Ohio, 438 U.S. 586, Bell v. Ohio, 438 U.S. 637; by a death sentence that is imposed without a full and fair sentencing hearing, Gardner v. Florida, 430 U.S. 349, Green v. Georgia, 442 U.S. 95; and by a death sentence imposed for rape of an adult, Coker v. Georgia, 433 U.S. 584. Capital punishment has been upheld when it is imposed through the reasoned and channeled discretion of the sentencing authority, after a full opportunity for the condemned to make the case for his life before that authority and on appellate review; Gregg v. Georgia, 428 U.S. 153, Proffitt v. Florida, 428 U.S. 242, Jurek v. Texas, 428 U.S. 262. See Godfrey v. Georgia, 446 U.S. 420.

And yet, underlying procedure is substance. The Eighth Amendment forbids punishment that is excessive or disproportionate. It must be offended by the execution of a person about whose guilt this much doubt remains.

Although appellate courts generally defer to the determination of facts by a trial court and to the discretion of a sentencing court, the death penalty must be treated differently. As the Justices of this Court have recognized repeatedly, death is a different penalty. The capital punishment schemes upheld by this Court in Proffitt and Gregg required that the state supreme court review each death sentance to make sure that the application of this supreme penalty was appropriate. Proffitt v. Florida, 428 U.S. 242, 258-59; Gregg v. Georgia, 428 U.S. 153, 204-06. The federal courts,

faced with a case where the record shows such a strong possibility that the defendant did not commit this crime, can do no less.

B. Montana's Failure to Provide Participation by a Jury in Imposing the Death Penalty Denied Coleman His Right to the Judgment of His Peers in Contravention of the Sixth, Eighth, and Fourteenth Amendments.

Under the Montana statutory scheme for the imposition of capital punishment, the life and death decision of which of the two possible penalties shall be imposed is to be made solely by the trial court. The jury is excluded totally from the sentencing process. Mont. Code Ann. §§ 46-18-301 through 46-18-310.

The reasons for adding the jury's voice to that of the judge are the same in this setting as they are in any setting: the jury provides the best test of the standards of the community and improves the fact-finding process. Those reasons take on even greater weight here, where the literally life-and-death nature of the decision -- and the emotional freight it often carries -- makes it too important to rest on one set of shoulders. See generally Gillers, Deciding Who Dies, 129 U. Pa. L. Rev. 1 (1980).

A vindictive, determined, or merely strongly convinced judge should not be able to condemn a defendant to death without at least the cautionary influence of a jury. The dissenting opinion in the second Coleman appeal details many of the reasons to believe that this sentencing judge was not fair. 605 P.2d at 1039-40. The dissenting justice concluded:

> If these factors, individually, or at least collectively, do not demonstrate that the sentencing authority was "under the influence of passion, prejudice, or any other arbitrary factor" (emphasis added), I do not know what would.

605 P.2d at 1040 (emphasis in original). One factor not mentioned in that dissent was that judge's reference, at trial, to the defendant, then 29 years old, as "this black boy." Trial Transcript Vol. IX at 2107, reproduced in the Appendix at page 193.

In Coleman's second appeal, the Montana Supreme Court noted the defendant's constitutional challenge to the State's juryless sentencing procedure in capital cases. The court dismissed it in a cursory fashion, stating that defendant's contention did not alter its view of the constitutionality of the procedure. The Montana Supreme Court did not address the absence in Montana of even an advisory role for the jury as is present under the Florida statutes upheld by this Court in Proffitt.

This Court granted certiorari on this issue, among others, in Lockett v. Ohio, 438 U.S. 586, and a decision on it was expressly reserved in the Chief Justice's opinion in that case. 438 U.S. at 609, n. 16. The issue was discussed in Proffitt, where Florida provided for merely advisory jury verdict on the death sentence, 428 U.S. at 252 (Opinion of Stewart, Powell, and Stevens, J.J.), but it has never been resolved by this Court.

The absence of the jury from any aspect of the Montana capital sentencing process is unconstitutional on two separate grounds:

1. Montana's exclusion of the jury from the capital sentencing process unconstitutionally removes the conscience of the community from consideration of whether the death penalty in a given case is consistent with contemporary standards of decency.

Jury determinations are one of "the [t]wo crucial indicators of evolving standards of decency respecting the imposition of punishment in our society," and determining the validity of capital-sentencing statutes requires that contemporary standards of decency be ascertained. Woodson v. North Carolina, supra, 428 U.S. at 293. Jury participation in capital sentencing represents "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). Indeed, "[e]xcept for four States that entirely abolished capital punishment in the middle of the last century, every American jurisdiction has at some time authorized jury sentencing in capital cases," McGautha v. California, 402 U.S. 183, 200 n.11.

The evolving standards of decency referred to above resulted, by the middle of this century, in the removal of the "onus of inflicting capital punishment" from the trial judge and had entrusted that life or death decision to the common sense judgment of the jury. United States v. Jackson, 390 U.S. 570, 576 n.12. The involvement of the jury in capital

sentencing reflected "a reluctance to entrust plenary powers over . . . life [and death] . . . to one judge or to a group of judges." Duncan v. Louisiana, 391 U.S. 145, 156 (1968). States that had not abolished capital punishment had come to realize that jury sentencing "places the real direction of society in the hands of the governed . . . and not . . . the government." Powell, Jury Trial of Crimes, 23 Wash. & Lee L. Rev. 1, 5 (1966), citing De Tocqueville, Democracy in America 282 [Reeve transl. 1948].

In 1968, this Court, in Witherspoon v. Illinois, 391 U.S. 510, 519 n.15, observed that ". . . one of the most important functions any jury can perform . . . is to maintain a link between contemporary community values and the penal system -- a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society," citing Trop v. Dulles, 356 U.S. 86, 101 (1958). See also Gregg v. Georgia, supra, 428 U.S. at 190.

Only four States now exclude the jury from participation in the capital sentencing decision: Montana; Idaho, Idaho Code § 19-2512(d) (Supp. 1980); Arizona, Ariz. Rev. Stat. § 13-703B (Supp. 1981); and Nebraska, Neb. Rev. Stat. § 29-2520. See Gillers, supra, at 14 n.51.3/

3/ When the Gillers article was written, Oregon and Alabama also excluded the jury from participation in sentencing. Oregon's statute was found to violate the State Constitution for that very reason. State v. Quinn, 50 Or. App. 383, 623

By totally eliminating the jury from the sentencing process in capital cases, Montana deprived Coleman of the benefit of the judgment of the community and entrusted the decision whether he should live or die to an agent of the State. The conscience of the community has been entirely removed from the process, offending the standards of decency and shared morality incorporated in the Eighth and Fourteenth Amendments to the Constitution.

2. The Sixth and Fourteenth Amendments require jury determination of the mitigating facts, the existence or nonexistence of which determines whether the accused shall live or die.

In Montana aggravated kidnapping may be punished by death; kidnapping may not be. The crime of aggravated kidnapping requires that the State prove as elements of the crime certain aggravating circumstances. In this case the aggravating circumstances were an intent to rape and to cause bodily injury. Those circumstances must be proven beyond a reasonable doubt at trial, where the defendant has a right to trial by jury.

(3/ continued) P.2d 630 (1981). Alabama, which had provided for jury imposition of the sentence but denied the jury any discretion in imposing the sentence when it found that certain aggravating facts existed, has since changed its capital punishment statute to provide for an advisory role for the jury. Ala. Code § 13A-5-46 (Supp. 1981). At least two other States, Florida and Indiana, provide only an advisory role for juries in capital sentencing. Fla. Stat. Ann. § 921.141 (Supp. 1980); Ind. Code Ann. § 35-50-2-9 (Burns 1979).

Montana's death penalty statute requires that one of seven aggravating circumstances be met before that penalty can be imposed. The only applicable factor in this case is the seventh: "The offense was aggravated kidnapping which resulted in the death of the victim." Mont. Code Ann. § 46-18-303(7). That finding was made here both by the judge at the sentencing hearing and, as the result of an amendment to the information suggested by the judge before the trial, as part of the aggravated kidnapping count at trial. Thus, although the Montana scheme does not require proof of the aggravating circumstance that leads to capital punishment, the jury did pass on that issue in this case. However, the mitigating facts, more crucial to the accused than the aggravating circumstances because on the presence of such facts his very life depends, were established at a penalty trial from which Montana has totally excluded jury participation, even in an advisory capacity.

Yet the mitigating "circumstances" and the elements that constitute the crime of aggravated kidnapping share one essential characteristic: they are facts. Aggravation and mitigation are reverse sides of the same coin, the former establishing whether the offense is capital, the latter establishing whether the accused is entitled to avoid the ultimate penalty. The particular mitigating facts established by Montana, proof of which will preclude the death penalty, have similiarities to facts that are frequently raised at criminal trials on the merits as defenses to the charge: participation or consent by the victim is similar to the defense of consent; duress is also available as an affirmative defense on the merits; the existence of the offender's extreme

mental or emotional disturbance is similar to the defense of insanity. In addition, the Montana scheme requires that the trial judge determine whether even an uncontested mitigating fact is "sufficiently substantial" to call for leniency. Mont. Code Ann. § 46-18-305.

The proof of mitigating circumstances, or their absence, is critical in this case. As discussed more fully in the third issue, below, Coleman urged as a significant mitigating factor his complete lack of a prior criminal record. No jury ever passed on that question. Instead, the sentencing judge, without warning, reached back at the sentencing hearing to Nank's entirely uncorroborated testimony that he and Coleman had burglarized a home earlier on the day of the murder. He then concluded that "the credit in mitigation allowed by Section 95-2206.9(1) [now Mont. Code Ann. § 46-18-304(1)] is not appropriate to this defendant." Findings, Conclusions, Judgment and Order, reprinted in 605 P.2d at 1048, Appendix at 155. This determination, critical to the imposition of the death sentence on Coleman, was made with no jury participation in finding the underlying facts on which the judge relied.

The requirement of making new factual findings in mitigation establishes a capital defendant's right to a jury determination of those facts. Where the determination of certain facts is crucial -- perhaps "of greater importance than the difference between guilt or innocence for many lesser crimes" -- the State may not dilute the standards by which those facts shall be proved merely by "characterizing them as factors that bear solely on the extent of punishment," Mullaney v. Wilbur, 421 U.S. 684, 698 (1975).

The Oregon Supreme Court adopted similar reasoning in striking down Oregon's death penalty scheme in State v. Quinn, 50 Or. App. 383, 623 P.2d 630 (1981). The Oregon statute in question allowed the imposition of the death penalty if the sentencing judge reached certain factual conclusions beyond a reasonable doubt.[4/] Or. Rev. Stat. § 163.116(2). One of those conclusions was that "the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result." Or. Rev. Stat. § 163.116(2)(a). This standard was higher than the mental state required for conviction. The Oregon Supreme Court concluded that, under the State Constitution, this factual finding had to be made by the jury. The court did not consider the application of the Sixth Amendment, but the language of the State and federal constitutional provisions is similar. The state constitution provides that "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury . . . ." Or. Const. art. I, § 11.

4/ Before a death sentence could be imposed the Oregon statute also required that the judge find there was a probability that the defendant would be a continuing threat to society. Or. Rev. Stat. § 163.116(2)(b). The statute required the judge to consider any mitigating circumstances offered by the defendant in making that decision. If the issue of provocation was raised by the defendant, the judge was also required to find that the conduct of the defendant was an unreasonable response to that provocation. Or. Rev. Stat. § 163.116(2)(c).

There is no constitutionally valid reason for the Montana capital procedures to provide for a jury trial of the existence of aggravated kidnapping and of these defenses to the crime, and to deny at the penalty trial the right to have a jury determine the same kinds of facts, merely because the legislature has designated those facts as "mitigating circumstances."

C. Coleman Was Denied Due Process of Law When the Sentencing Judge's Conclusion That No Significant Mitigating Circumstances Existed Was Based on a Conclusion That Coleman Committed a Crime With Which He Was Never Charged, Which Coleman Did Not Have an Adequate Opportunity To Refute.

The statute under which this sentence was imposed required the sentencing judge to consider mitigating circumstances before imposing sentence. One mitigating circumstance specifically mentioned was that "The defendant has no significant history of prior criminal activity." Mont. Code Ann. § 46-18-304(1). The judge concluded that this mitigating circumstance did not apply by making findings Coleman never had an adequate chance to contest.

The judge's findings on resentencing are printed as an appendix to the second Coleman appeal. His first finding stated that "The two men [Nank and Coleman] burglarized a home in Roundup, Montana, on July 4, 1974, and stole several rifles which were subsequently buried near the Roundup Airport." 605 P.2d at 1049, Appendix at 156. His second finding stated:

> That the State has been unable to prove by means of record checks that the defendant has any other history of criminal activity. The only other criminal act which appears in the trial record in this cause is the aggravated burglary of a home in Roundup, Montana, where certain guns were stolen by the defendant and Robert Nank on July 4, 1974. By reason of the foregoing, the credit in mitigation allowed by Section 95-2206.9(1) [now section 46-18-304(1)] is not appropriate to this defendant.

605 P.2d at 1050, Appendix at 157.

Dewey Coleman was never convicted of aggravated burglary. In fact, he was never charged with it. No evidence of this alleged crime was presented at Coleman's trial other than Nank's unsupported testimony, not even a report that guns had been stolen. Nor did Coleman have any reason to challenge Nank's tale of burglary at trial. The Montana capital punishment statute at that time included a mandatory death sentence; the alleged burglary could make no difference in Coleman's sentence.

The transcript of the sentencing hearing, which took place three years after Coleman's trial, contains no mention of the judge's reliance on this burglary to eliminate Coleman's clean record as a mitigating factor. The alleged burglary appears first in the judge's written findings of facts on sentencing.

This treatment denied Coleman due process of law. He was sentenced to death in part for a crime with which he was never charged, the evidence of which he never had an adequate opportunity to refute. The fundamental unfairness of this result demands that this sentence be vacated.

In Presnell v. Georgia, 439 U.S. 14, this Court reversed the death sentence imposed on Presnell for murder committed in the course of forcible rape. The Georgia Supreme Court had reversed Presnell's conviction for forcible rape, but upheld this death sentence because it found that the record supported a conclusion that Presnell committed forcible rape.

Quoting the Court's opinion in Cole v. Arkansas, 333 U.S. 196, the Court in Presnell wrote:

> "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." Id., at 201-02.

> These fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial. Cf. Gardner v. Florida, 430 U.S. 349 (1977). In light of these principles, the death sentence for the crime of murder with malice aforethought cannot stand.

439 U.S. at 16-17.

Although proof of aggravated burglary was not directly required for imposition of a death sentence, the Montana statute provides that the court "shall impose a sentence of death if it finds one or more of the aggravating circumstances and finds that there are no mitigating circumstances sufficiently substantial to call for leniency." Mont. Code Ann. § 46-18-305 (emphasis added). The sentencing judge relied expressly on this aggravated burglary to conclude that Coleman's previously spotless record did not entitle him to "credit in mitigation." Thus, like Presnell, Coleman was sentenced to death based on a judicial determination that he had committed a crime of which he had never been convicted. In Coleman's case, the other crime had never even been charged.

Coleman's case is also similar to Gardner v. Florida, 430 U.S. 349. In Gardner this Court vacated a death sentence imposed, in part, on the basis of a presentence report withheld from defense counsel. The plurality opinion explained that due process was violated because the defendant had no opportunity to deny or explain the facts contained in the sentencing report. 430 U.S. at 362 (Opinion of Stevens, Stewart, and Powell, J.J.).

In this case the critical information was known to the defense, but, more importantly, there was never an adequate opportunity to refute the charges. The trial did not provide an adequate opportunity; Nank's burglary story was completely irrelevant to Coleman's fate at that time. It took a decision by the Montana Supreme Court and new legislation before Coleman's prior record could be a factor in sentencing.

The sentencing hearing also failed to provide a constitutionally adequate opportunity for Coleman to attack Nank's story. The judge's reliance on this alleged burglary first appeared in the order reimposing the death sentence. Coleman's opportunity before the hearing to guess that the judge would refuse to credit his clean record because of Nank's unsupported testimony cannot be a constitutionally sufficient opportunity to deny or explain." Gardner v. Florida, 430 U.S. 349, 362 (Opinion of Stevens, Stewart, and Powell, J.J.).

Use of Nank's uncorroborated testimony in this manner to deny Coleman the benefit of one of the mitigating circumstances specifically mentioned in the Montana death penalty statute would deprive him of life without due process of law. This death sentence must be vacated.

CONCLUSION

For the reasons stated and under the authorities cited above, petitioner prays that this Court grant the petition for a writ of certiorari.

Dated: December 22, 1981.

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